No: 83-1836 (3)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MELVIN M. BURTON, JR.
A Member of the Bar of the
District of Columbia Court of Appeals

Petitioner,

v.

BOARD ON PROFESSIONAL RESPONSIBILITY OF THE
DISTRICT OF COLUMBIA COURT OF APPEALS

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE BOARD ON PROFESSIONAL RESPONSIBILITY IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner received notice under the due process clause of the Fifth Amendment to the Constitution of the United States that he was being charged with misappropriation under Disciplinary Rule 9-102(A).

2. Whether the sanction of disbarment imposed in cases involving knowing commingling and misappropriation of client funds is consistent with precedent in the District of Columbia.

3. Whether the Board on Professional Responsibility is estopped from instituting disciplinary proceedings against petitioner on facts elicited on cross-examination in another disciplinary proceeding.

4. Whether due process is violated when petitioner is denied the opportunity to conduct a *voir dire* of Hearing Committee members in disciplinary proceedings.

5. Whether the authority of the Board on Professional Responsibility to institute disciplinary proceedings against a member of the District of Columbia Bar presents a federal question which warrants this Court's review.

6. Whether the substantial evidence standard used by the Board on Professional Responsibility and the District of Columbia Court of Appeals in reviewing disciplinary proceedings violates due process.

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OPINION BELOW

The opinion of the District of Columbia Court of Appeals (Pet. App. A 1-A-73) is reported at 472 A.2d 831 (D.C. 1984)

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on January 11, 1984. A petition for rehearing *en banc* was denied on April 2, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATEMENT

Petitioner was ordered disbarred from the practice of law by the District of Columbia Court of Appeals for violations of disciplinary rules set forth in the District of Columbia's Code of Professional Responsibility. The violations arose in two separate proceedings. In a complaint brought by Gladys Anderson (hereinafter the *Anderson* matter), a Hearing Committee of the Board on Professional Responsibility of the District of Columbia Court of Appeals found that petitioner commingled and misappropriated funds in his capacity as a court-appointed trustee in violation of Disciplinary Rule 9-102(A)[1] and that he engaged in dishonest conduct in violation of Disciplinary Rule 1-102(A)(4). The Hearing Committee's recommendation that petitioner be disbarred was adopted by the Board on Professional Responsibility (Board).

Petitioner was also found to have commingled and misappropriated client funds in violation of Disciplinary Rule 9-102(A) and Disciplinary Rule 1-102(A)(4) in a complaint brought by Mrs. Loretta Pailin (hereinafter the *Pailin* matter). The Hearing Committee recommended that petitioner be suspended from the practice of law for four years. That sanction was rejected by the Board which recommended that petitioner be disbarred.

Both the *Anderson* and *Pailin* matters were consolidated for purposes of appeal. The District of Columbia Court of Appeals adopted the recommendations of the Board in both cases and ordered that petitioner be disbarred from the practice of law. *In re Burton*, 472 A.2d 831 (D.C. 1984).

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1. DR 9-102 was renumbered DR 9-103 on April 30, 1982, when the District of Columbia Court of Appeals amended the Code of Professional Responsibility with the "revolving door" rules, now DR 9-102. ("*REVOLVING DOOR*"), 445 A.2d 615, 618 (D.C. 1982) (*en banc*). For purposes of consistency with the petition, Hearing Committee Report and Board Report, we refer to what is now DR 9-103 as DR 9-102 in this brief.

A. The Anderson Matter

The evidence, as reflected in the opinion of the District of Columbia Court of Appeals showed that petitioner was appointed by the Superior Court of the District of Columbia on February 9, 1979, as trustee to sell real property on behalf of Gladys Anderson. The land was sold on April 9, 1979, for $18,000 less encumbrances, liens, costs and appropriate adjustments.

On April 30, 1979, petitioner opened a trust account into which he deposited an initial payment of $12,777.83. Petitioner later deposited additional proceeds from the sale which brought the net amount received from the sale to $13,407.42. The evidence showed that during the period of November 14, 1979, to January 14, 1981, petitioner made unauthorized withdrawals from the account for his personal and business uses and that he deposited amounts from unidentified sources into the account. These transactions caused the account to have shortages and overages during the above period and resulted in a balance of $191.30 on April 9, 1980, less than 2% of the $10,495.09 for which petitioner was then accountable as trustee.

The Auditor-Master of the Superior Court scheduled a hearing to inquire into the mishandling of the estate funds. At the hearing, petitioner acknowledged his misuse of the trust funds but claimed that he did not endanger its security since he had reserves of cash derived from his law practice to replenish the estate. In support of this claim, petitioner testified under oath that he grossed in excess of $150,000 from his law practice in 1979. However, his business tax return for that year showed that in 1979, petitioner reported a gross income from his business of $58,073. During his disciplinary proceeding, petitioner acknowledged that his testimony to the Auditor-Master was false.

B. The Pailin Matter

The evidence presented to the Hearing Committee showed that petitioner was retained by the Veterans Administration (VA) to institute foreclosure proceeding against Nathaniel and Loretta Pailin when they defaulted on a VA loan secured by a real estate

deed of trust. The property was sold at a foreclosure sale in June, 1978, for $28,000. Petitioner was retained to remit to the VA the amount owed on the outstanding loan (approximately $17,000) and to pay the remainder to the Pailins after deducting his fees and other expenses associated with the sale.

Petitioner received a check for $26,378.16 from the settlement company as the net proceeds of the sale. Thereafter, on July 16, 1978, petitioner deposited the check, less a sum of $1,505.90 (not here in question) into his client trust account. After deducting his fee and paying other costs, petitioner was accountable to the VA for $16,638.68 and to the Pailins for $7,256.10, an aggregate amount of $23,895.78.

On July 18, 1978, petitioner wrote a check on the trust account for $1,000, so that the account's balance fell to $23,744.11, a sum less than the amount payable to the VA and the Pailins. Subsequent checks written on the account, payable neither to the VA nor the Pailins, caused the balance to fall to $19,969.66.

On July 27, 1978, petitioner paid the VA the $16,639.68 which it was owed from the foreclosure sale. That transaction left a balance of $2,929.28, even though, by petitioner's own accounting, he still owed the Pailins $7,256.10. Petitioner continued to misappropriate the trust funds so that by late November, 1978, the account balance dropped to as low as $10.10.

On November 14, 1979, Ms. Pailin was paid her share of the proceeds, in the amount of $3,628.05. This payment was made by petitioner out of funds he was holding as a court-appointed trustee in the *Anderson* matter. Mr. Pailin was never paid his share of the proceeds. (TR. P. 31-32).[2]

ARGUMENT

1. Petitioner contends that at the time he was charged with Disciplinary Rule 9-102(A) in the *Anderson* matter, the rule prohibited only the commingling of client funds and did not apply to misappropriation. Accordingly, petitioner claims that when

2. The transcript of the hearing in the *Pailin* matter is cited as TR. P.

he was found to have commingled and misappropriated funds as a court-appointed trustee in violation of that rule, that he was deprived of his right to notice of the charges against him as required by the due process clause of the Fifth Amendment.

Petitioner's contention is without merit, for the following reasons. First, the petition which set forth the charges in this case clearly placed petitioner on notice that he was being charged with misappropriation as well as commingling under Disciplinary Rule 9-102(A). The petition states in part that petitioner "commingled trust funds . . . and made withdrawals of funds from the trust account for his personal and business uses" and that during this period that petitioner "caused the trust account to have a smaller balance . . . than the amount which was subject to the trust." These allegations clearly included a charge of misappropriation, i.e., using the funds of another without authority to do so.

Second, Disciplinary Rule 9-102(A) unquestionably applied to misappropriation at the time of the violations in *Anderson*. The rule requires that client funds paid to a lawyer "be deposited in one or more identifiable bank accounts maintained in the state in which the law office is situated . . ." DR 9-102(A). As the District of Columbia Court of Appeals noted, unauthorized withdrawals are inconsistent with the rule "unless the requirement to deposit is given only a formal meaning." *In re Burton*, 472 A.2d at 838; *In re Quimby*, 359 F.2d 275 (D.C. 1966); *In re Burka*, 433 A.2d 181 (D.C. 1980); *In re Harrison*, 461 A.2d 1034 (D.C. 1983).

In addition, the Court found that a construction of Disciplinary Rule 9-102(A) that includes misappropriation is consistent with the rule's purpose of guarding against the possible loss of client funds. *Id.* Other jurisdictions have similarly concluded that Disciplinary Rule 9-102(A) prohibits both commingling and misappropriation. *See, e.g., In re Wilson*, 81 N.J. 451, 454, 409 A.2d 1153, 1154 (1979) ("Misappropriation of client funds is both a crime . . . and a direct violation of Disciplinary Rule 9-102"); *In re Pattison*, 441 A.2d 328, 329 (Md. 1982).

Thus, the explicit terms of the petition, which alleged a violation of Disciplinary Rule 9-102(A), placed petitioner on notice that he was charged with misappropriation of funds he held as a court-appointed trustee. Petitioner's due process claim must accordingly fail.

2. Petitioner contends that the District of Columbia Court of Appeals retroactively applied a newly adopted definition of and sanction for misappropriation when it ordered his disbarment in *Anderson* and *Pailin*. Petitioner further claims that the sanction of disbarment was overly severe and discriminatorily applied by the District of Columbia Court of Appeals.

Petitioner did not raise this issue in the court of appeals. Inasmuch as this issue was not preserved below, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. 783, 788 n.6 (1977).

Even if petitioner's contention were properly before the Court, it is without merit. Contrary to petitioner's claim, his conduct was not judged by a "new" definition of misappropriation. Rather, members of the Bar have been on notice since 1966 that the ordinary sanction for misappropriation is disbarment. *In re Burka*, 433 A.2d 181; *In re Quimby*, 359 F.2d 275.

Decisions of the court of appeals with regard to the proper sanction in misappropriation cases are also not inharmonious, as petitioner claims. While disbarment is the ordinary sanction in cases of intentional misappropriation, the court has imposed less severe sanctions where the misappropriation is inadvertent. For example, in *In re Harrison*, an attorney failed to keep accurate bank records and accordingly allowed the balance in a commingled account to fall below the amount held in trust for his client. The court of appeals found that, even though the attorney had not intended to expend his client's funds for his personal use, misappropriation had occurred and imposed a period of suspension for a year and a day. 461 A.2d at 1035.

Similarly, in *In re Hines*, No. M-141-82 (D.C. Sept. 26, 1984), the District of Columbia Court of Appeals found that misappropriation occurred where an attorney showed a "reckless disregard" of the security of client funds where he failed to keep running account balances and allowed the total balance of his commingled accounts to fall below the amount he was supposedly holding for his clients. The court ordered the attorney suspended for a period of two years. *See also In re Cefaratti*, No. M-140-82 (D.C. June 28, 1983).

Thus, while a lesser sanction might be appropriate where the misappropriation is inadvertent, disbarment is the ordinary sanction in cases of intentional misappropriation. Here the evidence showed that the petitioner knowingly misused trust account funds in the *Anderson* and *Pailin* matters. In *Anderson* petitioner acknowledged that he used the trust funds to pay his office rent, the office rent of his associates, witness fees, refunds of client fees, his secretary's salary, tax bills, his law clerk's salary and other expenses unrelated to the trust. *In re Burton*, 472 A.2d at 837, 839. In *Pailin*, the court of appeals found a knowing misappropriation of trust account funds, that was not due to sloppy bookkeeping, where account records showed that petitioner had written numerous checks which caused the account balance to fall to as low as $10.00 at a time when petitioner still owed the Pailins more than $23,000. *In re Burton*, 472 A.2d at 844. Accordingly, the court of appeals' sanction of disbarment was neither overly harsh nor discriminatory but was imposed in accordance with judicial precedent.

3. Petitioner claims that, in the *Anderson* case, he was cross-examined regarding the same charges raised in the *Pailin* proceeding and that, therefore, Bar Counsel was collaterally estopped from bringing charges in the *Pailin* case. Petitioner's assertion is without merit.

First, although petitioner did raise the collateral estoppel argument before the Hearing Committee, he did not raise it before the Board or in the District of Columbia Court of Appeals. Thus,

even if the collateral estoppel argument had some merit, that issue was not preserved below and it is not properly presented in this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n. 6.

In any event, the issue of collateral estoppel does not warrant further review in this case. The doctrine of collateral estoppel operates to prevent the relitigation and adjudication of a matter which has been already decided by an appropriate forum. *Kremer* v. *Chemical Constr. Corp.*, 456 U.S. 461 102 S.Ct 1883 (1982). Here the issue of the misappropriation of the Pailin's money was neither litigated nor adjudicated in *Anderson*. The Hearing Committee accordingly concluded that petitioner's collateral estoppel argument failed for lack of proof. In addition, petitioner cannot claim that the introduction of evidence of the *Pailin* matter in the *Anderson* case prejudiced his rights since both cases were consolidated at his request in the District of Columbia Court of Appeals. Therefore, petitioner's collateral estoppel argument is a non-issue.

Moreover, petitioner overlooks the fact that he raised the *Pailin* issue on direct examination in the *Anderson* case. That is, in defending the charge of misappropriation against him in *Anderson*, petitioner contended that his initial breach of the trust account was unintentional. He claimed that on the day he breached the trust, he inadvertently wrote a certified check to Ms. Pailin for $3,300 on the trustee account when he actually intended to write the check on another account. To impeach petitioner, Bar Counsel elicited testimony from him concerning the *Pailin* matter to show that on the day petitioner wrote the certified check to Ms. Pailin for $3,300, he did not have sufficient funds in his client trust account to cover that check. Thus, petitioner "opened the door" with regard to the *Pailin* matter on direct examination. The consequent cross-examination by Bar Counsel was accordingly proper. *See Alford* v. *United States*, 282 U.S. 687, 691 (1931); Fed.R.Evid. 610(b).

4. In the *Pailin* matter, petitioner argues that he was deprived of his rights under the Fifth and Sixth Amendments to conduct a *voir dire* of members of the Hearing Committee that initially

heard his case. This issue was not raised in the court of appeals and is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n.6.

In addition, there is no general right to a *voir dire* of Hearing Committee members—who serve in a quasi-judicial capacity—any more than there is a right to *voir dire* a judge before filing a motion for his recusal. Petitioner also does not set forth grounds to show why the failure to conduct a *voir dire* resulted in a deprivation of his right to due process. In fact, when asked by the Hearing Committee what issues he would raise in a *voir dire*, if allowed to conduct one, petitioner was unable to show that he had a factual basis for a challenge to any hearing committee member or for a *voir dire* on any specific area of inquiry. (TR. P. 3-4). Under these circumstances, petitioner wholly failed to establish a due process violation.

5. Petitioner challenges the jurisdiction of the Board on Professional Responsibility to entertain the disciplinary proceeding against him in the *Anderson* matter. He claims that since the superior court, which discharged him as trustee, failed to refer his case to the Board, the Board was without authority to investigate allegations of his misconduct. This issue is not properly before the Court since it does not raise a federal question. *See* 28 U.S.C. § 1257(3). The Board's authority to entertain the disciplinary proceeding against petitioner is purely an issue of local law which was resolved in the Board's favor by the District of Columbia Court of Appeals. *See Financial General Bankshares, Inc.* v. *Metzger*, 220 U.S. App. D.C. 219, 680 F.2d 768 (1982).

6. Petitioner contends that in reviewing a disciplinary proceeding, the due process clause of the Fifth Amendment requires both the Board on Professional Responsibility and the District of Columbia Court of Appeals to utilize a standard greater than the substantial evidence test for review. Petitioner's assertion is without merit.

First, as with several other issues raised by petitioner, this issue was not raised in the District of Columbia Court of Appeals.

Since it was not preserved below, it is not properly before this Court. *United States* v. *Lovasco*, 431 U.S. at 788 n.6.

Second, the standard for judicial review of disciplinary proceedings in the District of Columbia is well-settled. Rule XI, § 7(3) of the Rules Governing the District of Columbia Bar provides in pertinent part: "In considering the appropriate order, the court shall accept the findings of fact made by the Board unless they are unsupported by substantial evidence of record." The same standard is used by the Board when reviewing findings of fact made by a Hearing Committee. The Board on Professional Responsibility of the District of Columbia Court of Appeals Internal Rule 12.6 (1983).

This standard of review is identical to the "substantial evidence" test of the District of Columbia's Administrative Procedure Act, D.C. Code Ann. §1-1510(3)(E) (1973), and to the standard of review used in proceedings to revoke the licenses of physicians. *See Sherman* v. *Commission on Licensure to Practice the Healing Art*, 407 A.2d 595 (D.C. 1979). Nevertheless, petitioner claims that the test violates his right to due process of law.

In *In re Smith*, 403 A.2d 296 (D.C. 1979), a similar challenge to the standard of review in disciplinary proceedings was raised. The court of appeals rejected the contention that the Board on Professional Responsibility should use a "clear and convincing evidence" test, noting that while the Board will normally utilize a "substantial evidence on the record as a whole" standard in reviewing findings of a Hearing Committee, the Board uses a "clear and convincing evidence" test when making its own findings of fact. *Id.* at 302. In view of the protection afforded petitioner of requiring the Board to utilize a "clear and convincing" test when making its own findings, and the fact that the substantial evidence test utilizied by the Board and the District of Columbia Court of Appeals comports with the standard of review in similar license revocation proceedings, petitioner's due process claim must fail.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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